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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

STATE OF INDIANA, LEO D. JENKINS, individually and as Warden of the Indiana State Prison; JACK R. DUCKWORTH, individually and as Assistant Warden of the Indiana State Prison; ROBERT P. HEYNE, individually and as Commissioner of Corrections of the State of Indiana; CLOID SHULER, individually and as Executive Director of Adult Authority for the Indiana Department of Corrections; THE BOARD OF CORRECTIONS OF THE STATE OF INDIANA, WILLIAM D. BONTRAGER, ARTHUR P. COBLENTZ, J. DAVID BAKER, DR. RONALD H. HULL, JOHN W. WHITE, THERESE MARIE RAZZINI, and DR. ROBERT A. KELLER individually and as members of the BOARD OF CORRECTIONS OF THE STATE OF INDIANA,

Petitioners,

vs.

KHALID CHOUDHRY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinion Below	1
Jurisdiction of the Court	2
Questions Presented for Review	2
Statement of the Case	2
Argument	3
Conclusion	6
Appendix A	7
Appendix B	23
Appendix C	33

TABLE OF AUTHORITIES

Cases — *Page*

Myers v. Polk Miller Products Corp., 201 F.2d 374 (U.S. Court of Customs and Patent Appeals 1953) 6

Pickering v. Board of Education, 391 U.S. 563 (1968)..... 5

Radobenko v. Automatic Equipment Corporation, 520 F.2d 540 (9th Cir. 1975) 6

Schesch v. United States, 249 U.S. 47 (1919) 5

Constitutional and Statutory Provisions

First Amendment to the Constitution of the United States 5

28 U.S.C. § 1254 2

Other Authorities

Rule 56 of the Federal Rules of Civil Procedure 2

Rule 61 of the Federal Rules of Civil Procedure 6

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Petitioners,

vs.

KHALID CHOUDHRY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings on the 22nd day of July, 1977.

OPINION BELOW

The opinion of the Court of Appeals is attached hereto as Appendix A.

The prior opinion of the United States District Court for the Northern District of Indiana is attached hereto as Appendix B.

JURISDICTION OF THIS COURT

The Opinion of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was issued on July 22, 1977. No petition for rehearing was filed with the Court of Appeals.

The basis for jurisdiction of this Court is found in 28 U.S.C. § 1254.

This Court should consider this appeal for the reason that the issue here involves a substantial Federal question of the interpretation of the Federal Rules of Civil Procedure, Rule 56, which should be settled by this Court.

QUESTIONS PRESENTED FOR REVIEW

Whether a United States District Court may on its own motion (*sua sponte*) grant summary judgment without notice, to defendant, where such Court has determined that there exists no genuine issue of fact which may alter the findings or conclusions of the Court.

Whether the District Judge erred in granting summary judgment for defendants.

STATEMENT OF THE CASE

Choudhry began his employment as a correctional officer on April 12, 1976. On June 19, 1976, he called a press conference at which time he made allegations concerning lack of security at the Indiana State Prison, lack of trained personnel, security practices and other matters. The prison officials, upon learning of such press conference through newspaper releases, suspended Choudhry. On June 22, 1976 the Prison Personnel and Training Committee conducted a hearing to gather information to be presented

to Warden Jenkins concerning the validity of Choudhry's allegations. Two days after receipt of this Committee's report, Jenkins permanently dismissed Choudhry from his duties at the prison.

Litigation was initiated by plaintiff Khalid Choudhry seeking damages, declaratory and injunctive relief because of his discharge from employment at the Indiana State Prison. The complaint was filed in the Hammond Division of the United States District Court for the Northern District of Indiana together with a motion for temporary restraining order, on July 2, 1976.

On July 7, 1976, a hearing was held on motion for temporary restraining order, at which time the Judge found that venue was improper and ordered the case transferred to the South Bend Division. On July 19, 1976, a hearing was held on the motion for temporary restraining order. On August 2, 1976, the District Judge denied the motion for temporary restraining order and, on his own motion, granted summary judgment for the defendants, "since there exists no genuine issue of fact which may alter the findings or conclusions of this Court." (Appendix B, p. 32)

On appeal to the United States Court of Appeals for the Seventh Circuit the judgment of the District Court was reversed and remanded for further proceedings (Judge Pell dissenting).

ARGUMENT

The Seventh Circuit, in the majority opinion, relied heavily upon the comments made by the District Judge in the course of the hearing on the temporary restraining order. However, as pointed out by Judge Pell, in his dissenting opinion:

> "I also add that it appears to me, in fairness to the district judge, it should be observed that while he did comment during the course of the extended

> hearing on July 19, 1976, that what was before the Court was of the matter of the temporary restraining order, he also stated near the conclusion of the hearing that there were exhibits in evidence which he had not had an opportunity to read. He indicated also that he wanted to give "this a little research." It would seem that after doing so for a reasonable length of time he concluded that the plaintiff's claim was meritless and with this I agree."

Courts should not be required to perform futile acts, and where the procedural rules of this or any other Court make such futile action mandatory, the Court has inherent power to modify the rule to avoid delay and to reduce the injustice which will naturally proceed from technicalities of pleading and practice and to determine whether there exist legitimate issues of fact requiring a formal trial on the merits. It has been said that the remedy of summary judgment is essentially one in the interest of justice, and its object is to obtain justice forthwith where no triable issue is raised, and thereby to avoid needless trials and delay.

Upon the record the District Court properly entered summary judgment terminating litigation which could not reach a different result no matter how much evidence was adduced and no matter how much irrelevant and immaterial factual conflict might be developed. Here the District Court did make findings of fact and conclusions of law stating that Choudhry's First Amendment rights had not been violated. Further, that since Choudhry's action was based solely upon an alleged violation of his First Amendment rights the plaintiff's contentions were moot.

The basic facts are not disputed. The plaintiff, a newly hired security officer, did call a press conference at his home. He did issue irresponsible statements to the press concerning matters about which he knew nothing and about which he had made no attempt to gain knowledge. His

employment was terminated as a result thereof; not because he had talked to the press and news media, but because his statements were irresponsible and made without knowledge of the facts whereof he spoke.

Choudhry's rights under the First Amendment were not violated, for in this instance the statements were not of the type protected by the Constitution. As the First Amendment does not protect a man falsely shouting fire in a theatre, *Schesch v. United States,* 249 U.S. 47, 52 (1919) neither can it protect a man who makes equally dangerous statements as informing prisoners, in a maximum security prison, that security is lax, that guards are untrained, that weapons are available, and that escape would be easy. The expert testimony before the District Court clearly bears out that such statements were dangerous and were made by the plaintiff Choudhry.

This Court in *Pickering v. Board of Education,* 391 U.S. 563 at 573, fn 5 (1968), noted that public comment by a public employee constitutes evidence that the employee is unfit to perform his duties, which grounds for discharge would not involve First Amendment issues.

The Court, from evidence presented at the hearing on the temporary restraining order, determined that there was no violation of Choudhry's rights under the First Amendment and that no issue was presented in plaintiff's complaint, and quite properly ordered a summary judgment in favor of defendants. The fact that the Court acted on its own motion is of little consequence as it is obvious that the defendants would have filed a motion for summary judgment following the Court's denial of the temporary restraining order. The plaintiff Choudhry's claim of a violation of his Constitutional rights under the First Amendment was determined to be patently without merit leaving nothing more for the Court to determine as the alleged First Amendment violation was the only issue pre-

sented. *Radobenko v. Automatic Equipment Corporation,* 520 F.2d 540 (9th Cir. 1975). *Myers v. Polk Miller Products Corp.,* 201 F.2d 374 It follows that any error, if error there be, in the ruling of the Court was harmless under the Rules of Civil Procedure Rule 61.

CONCLUSION

For the foregoing reasons, petitioners pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings on the 22nd day of July, 1977.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
ATTORNEY GENERAL
OF INDIANA

KHALID CHOUDHRY,
Plaintiff-Appellant,
v.
LEO D. JENKINS, et al.,
Defendants-Appellees.
No. 76-1967

Appeal from the United States District Court for the Northern District of Indiana
No. S-76-117—ROBERT A. GRANT, *Judge.*

HEARD APRIL 11, 1977—DECIDED JULY 22, 1977

Before CASTLE, *Senior Circuit Judge,* CUMMINGS and PELL, *Circuit Judges.*

CUMMINGS, Circuit Judge. On June 24, 1976, Khalid Choudhry, a Pakistani resident alien, was terminated from his position as a correctional officer at the Indiana State Prison at Michigan City, Indiana, after making certain critical comments about the prison's administration to the press. About a week after his dismissal, Choudhry filed a verified 42 U.S.C. § 1983 complaint alleging that his dismissal by the defendant prison officials had unconstitutionally infringed upon his free speech rights secured to him under the First and Fourteenth Amendments.[1] Plaintiff sought damages as well as declara-

[1] A lawfully admitted resident alien, of course, is a person within the meaning of the Fourteenth Amendment. *Graham v. Richardson,* 403 U.S. 365, 371. Therefore, he enjoys the protection of those amendments in the Bill of Rights which are incorporated through the Fourteenth Amendment so as to be applicable to the states, at least in matters wholly unrelated to immigration and naturalization.

tory and injunctive relief. Along with his complaint, plaintiff filed a motion for a temporary restraining order commanding his reinstatement as a correctional officer at the prison. On July 19, 1976, after hearing evidence and argument on the question of whether the temporary restraining order should issue, the district court took the matter under advisement.[2] Two weeks later, the district judge entered an order with an accompanying Memorandum which denied plaintiff's motion for injunctive relief and which *sua sponte* decided that summary judgment be entered in favor of the defendants. This appeal resulted.

I

Once again we are confronted with

> "one of those troublesome cases in which an appeal follows a disposition occurring by way of procedures amounting to something less than a full trial and which, upon consideration of the briefs, oral argument, and record, presents serious procedural questions in a record situation wherein further attention at the trial court level with rectification of any procedural errors conceivably could be followed by the same result as before in the litigation. Nevertheless, bearing in mind the words of Mr. Justice Frankfurter that fairness of procedure is due process in the primary sense, *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 161, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (concurring opinion), we address ourselves to the issues raised upon this appeal to determine whether a reversal is required." *Macklin v. Butler,* 553 F.2d 525, 527-528 (7th Cir. 1977).

On June 18, 1976, two months after being hired as a probationary correctional officer at the prison,[3] Choudhry

[2] The complaint and motion for restraining order were filed in the Hammond Division of the United States District Court for the Northern District of Indiana. On July 7, 1976, a hearing on the temporary restraining order was held before a Hammond Division judge who found venue improper. The case was transferred to the South Bend Division where the restraining order hearing was held on July 19.

[3] Since First Amendment rights can be properly conceptualized as being secured by the liberty as opposed to the property clause of the Fourteenth Amendment, plaintiff's status as a probationary public employee is immaterial if his speech would be otherwise protected under the First Amendment. *Perry v. Sinderman,* 408 U.S. 593.

called the press to his home to express concern about security conditions at the prison. He also criticized the fact that he had received no formal training during his employment. Warden Jenkins thereupon issued a lock-out order against Choudhry barring him from the prison and suspended him pending an investigation. Articles based upon the press interview appeared in area newspapers the next day. The June 23 letter from Warden Jenkins informing Choudhry of his suspension recited that this "action and investigation has been necessary due to certain public allegations you have made regarding the security and organization of this institution."

On June 22, an administrative hearing was held by the prison authorities which plaintiff was required to attend without counsel although he was permitted, and in fact chose, to attend with a union representative present. After the prison authorities questioned plaintiff on the basis for the charges he made in the press interview, they made recommendations to Warden Jenkins who decided to terminate plaintiff. In his dismissal letter of June 25, Warden Jenkins stated dismissal

> "Has been deemed necessary due to the fact that you admitted giving parts of the contents of the [Guard] Post Orders to non-Department of Correction staff. This act constitutes a breach of security. Therefore you are unable to satisfactorily perform the duties and requirements of a Correctional employee at the Indiana State Prison.

At the temporary restraining order hearing, defendants conceded that Choudhry's dismissal was prompted by his public statements.

Relying on *Pickering v. Board of Education,* 391 U.S. 563, Judge Grant noted that "open comment by a public employee which is false, and made with the knowledge of its falsity or with reckless disregard of the truth, constitutes an impermissible form of expression" (Mem. op. at 4). Moreover, the district court found *Pickering* to

stand for the proposition that "certain statements, although true, may fall outside the ambit of first amendment protection if the need for confidentiality is so great as to justify a dismissal of the employee." *Id.* Applying these legal standards, Judge Grant found the plaintiff's allegations to be "wholly insubstantial" based on the "briefs, exhibits, and testimony of several witnesses." *Id.* The district court also found "these false utterances which appear in the newspaper articles have been made with reckless disregard as to their truth or falsity." *Id.* at 5. Given these findings the court reasoned that although

> "the principles of the Constitution are great, it is [the] real and serious threat to societal order which tips the balance in favor of defendants. This potential for disruption in a prison context is the factor which effectively distinguishes plaintiff's authority." *Id.* at 7.

The court concluded "[j]ust as 'the first amendment would not protect a man in falsely shouting fire in a theatre,' *Schenck v. United States,* 249 U.S. 47, 52 (1919), it cannot protect him in creating disturbances within a prison via the news media." *Id.* at 8.

As to certain true information allegedly given to the press concerning escape prevention procedures, Judge Grant held that "while the dissemination of the truth should rarely be prohibited, this Court finds that the potential adverse consequences flowing from the disclosure of the prison's weaponry and defense tactics clearly outweigh Choudhry's interest in speaking on matters of public concern." *Id.* at 8. Having decided that Choudhry's First Amendment rights had not been infringed, the court *sua sponte* granted summary judgment in favor of the defendants, *viz:*

> "[S]ince Choudhry has based his entire cause of action upon an unmeritorious constitutional claim, the defendants are entitled to an award of summary judgment. Accordingly, the Court, on its own motion, will grant summary judgment in favor of the defendants since there exists no genuine issue of fact which may alter the findings or conclusions of this Court." *Id.* at 9.

II

The district court's award of summary judgment came with no warning, taking plaintiff completely by surprise. No written or oral motion for summary judgment had been made nor does the record disclose a Rule 12(b) motion to dismiss. But most importantly, the district court itself definitively declared that it was limiting its attention to the temporary restraining order:

> "I'm not going to decide this case upon its final merits at this time and we are here only on the question of a temporary restraining order." Tr. at 159-169.

Shortly after this recitation, the district court offered the following response to plaintiff's suggestion that *Pickering* required balancing the rights of the speaker against the rights of the employer:

> "I think they would weigh heavier on your side if we were looking at this as on final merits. We are talking about a temporary restraining order right now without further evidence, without further thought." Tr. at 161-162.

Rule 56 plainly does not authorize a court to enter an arbitrary summary judgment *sua sponte* against a party; indeed the express language of paragraphs (a) and (b) of the Rule discloses that a motion for summary judgment is to be made by a party. Professor Moore consequently has concluded that "the court should rarely consider entering summary judgment *sua sponte* where no party has moved for summary judgment or the provisions of Rule 12 are not satisfied." 6 Moore's Fed. Prac. ¶ 56.12 (2d ed. 1976) at 338-339. We agree. Without a party-generated Rule 56 motion or Rule 12(b) motion which may be treated under Rule 12 as a motion for summary judgment, the district court normally lacks power to enter summary judgment. See *Dry Creek Lodge, Inc. v. United States,* 515 F.2d 926, 935-936 (10th Cir. 1975); *Mustang Fuel Corp. v. Youngstown Sheet and Tube Co.,* 480 F.2d 607, 608 (10th Cir. 1973). Here no party-generated Rule 56 or Rule 12(b) motion was made.

Sound policy supports our reading of Rule 56. "The early resolution of factually unsupported claims is a salutary purpose of summary judgment procedure, but that procedure in no way authorizes disposition by surprise." *Macklin v. Butler,* 553 F.2d 525, 530 (7th Cir. 1977). On those few occasions when district courts have attempted the *sua sponte* entry of summary judgment, the courts of appeals have reversed, recognizing that the notice and hearing policies of Rule 56 otherwise would be slighted. *Twin City Federal Savings and Loan Ass'n v. Transamerica Ins. Co.,* 491 F.2d 1122 (8th Cir. 1974); *Bowdidge v. Lehman,* 252 F.2d 366 (6th Cir. 1958); cf. *Brown v. Quinlan,* 138 F.2d 228 (7th Cir. 1943); see also *Morgan Guaranty Trust Co. of New York v. Martin,* 466 F.2d 593 (7th Cir. 1972).

Rule 56 "contemplates both fair notice that a summary judgment motion has been made and a reasonable opportunity to respond • • •." Material offered in "support of [plaintiff's] motion for a [restraining order] • • • the content of [which] was narrowly limited to the issues raised in that motion" simply does not permit the conclusion that Choudhry "receive[d] a fair opportunity to establish the existence of material controverted facts." *Macklin v. Butler,* 553 F.2d 525, 528 and n. 2 (7th Cir. 1977).

"Under proper circumstances [the notice and hearing] requirements of the Rule may be waived." *Mustang Fuel Corp. v. Youngstown Sheet and Tube Co.,* 480 F.2d 607, 608 (10th Cir. 1973). For example, in *United States v. Fisher-Otis Co.,* 496 F.2d 1146 (10th Cir. 1974), the parties agreed at a pre-trial conference to submit certain issues of law for decision by the court prior to the trial of factual issues. "By joining in the submission of the ultimate legal issues [t]herein involved to the District Court for resolution, defendants assumed or conceded that, as to the resolution of those legal issues, there were no essential facts in dispute." *Id.* at 1151-1152. In this posture, the "filing of a motion for summary judgment would have been a mere formality." *Id.* at 1152. See also *Wirtz v. Young Electric Sign Co.,* 315 F.2d 326 (10th Cir. 1963). No such waiver exists here.

It is, of course, well settled that a district court is not

authorized to resolve issues of fact on a motion for summary judgment. However, the dissent argues that the undisputed significant facts—"that a novice guard called what amounted to a press conference and told reporters that he did not know how to use a gun and that security was lax and disorganized"—fully justify the guard's dismissal "in the tinderbox context of any prison dependent upon security exceeding the purely minimal." We have no quarrel with the dissent's view that *Pickering's* constitutional balance must be struck in the context of the special factual tableau of the prison. And we are in general agreement that in the individual versus public interest assessment, the public interest is entitled to "very heavy weight in the measuring scales."

But besides the prevention of incendiary remarks in the prison setting, the public interest also encompasses concern for remarks which disclose prison security so abysmal as to put the public in jeopardy.[4] The public is entitled to know the state of the prison security as it impacts on public safety. A new recruit not yet steeped in the administrative system who informs the public of lax prison security therefore can find his and the public's interest to be partially coincident. We conclude the undisputed facts identified by the dissent are not *per se* sufficient to dismiss out of hand a suit implicating freedoms as fundamental and sensitive as those secured by the First Amendment.

Thus to the extent that the district court's decision here is based on a rejection of plaintiff's version of the operative material facts, it could not stand wholly apart from notice defects. *Illinois State Employees Union, Council 34 v. Lewis,* 473 F.2d 561, 565-566 (7th Cir. 1972). The hearing below disclosed numerous unresolved material factual issues. As to plaintiff's supposed failure to follow the established chain of command, Choudhry testified he had contacted several of his superiors a number of times with questions and complaints even though he had not been

[4] In this regard, we note that in the fall of 1975, six prisoners escaped from the facility and kidnapped Warden Jenkins and members of his family on a night when 27 guards were on duty (Pl. Ex. 10). Jenkins was not present at the temporary restraining order hearing below because he had a prior subpoena to appear at the trial of one of those prisoners (Tr. at 126).

instructed to do so. Assistant Warden Duckworth testified Choudhry was given on-the-job training in using a gun. Choudhry flatly rejected this testimony, and fellow prison guard Anthony Owens testified that he had never been taught to shoot a gun either.

Other disputes concerned whether Choudhry did or did not make certain statements to the press. Thus Choudhry denies telling the news media that a gun had been smuggled into the maximum security area or about an alleged escape route. In addition, certain guard post orders released to the press were alleged to be "classified" so that providing this information to the media itself was sufficient ground for dismissal. But Choudhry and other guards testifieed that they were unaware that such information was confidential. In any event, there was a factual conflict on whether the prison inmates already knew the substance of the supposedly "confidential" information.

From a close reading of the temporary restraining order hearing transcript in conjunction with a similar study of the administrative hearing transcript, one might infer that Judge Grant's apparent view that Choudhry's testimony was not a paradigm of cogency or persuasiveness had some validity. But Choudhry's testimony was not a transparent sham. Since we are not "convinced that the issues of fact created by [Choudhry] are not issues which this Court could reasonably characterize as genuine," summary judgment was improper. *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975). We hasten to add, however, that public employers need not fear the expense of a full-blown trial if they discharge an employee for his "irresponsible mouthing." In the forthcoming proceedings in the district court after remand, if the defendants file a motion for summary judgment, the district court is entirely free to grant summary judgment if the developed record shows no issue of genuine material fact.

III

Defendants posit an alternate ground for the district court's action. They suggest a Rule 41(b) dismissal after consolidation with trial on the merits pursuant to Rule 65(a)(2) can support the district court's disposition. This

alternate ground may not prevail. First the district court explicitly relied only on Rule 56 in granting a summary judgment. In addition, it is not immediately clear why a Rule 41(b) dismissal is appropriate where there is no failure to prosecute the suit or to comply with court rules or orders. In any event, there was no notice of consolidation; indeed there was no inkling of it anywhere in the record until defendants raised it in their brief. Notice of consolidation and an opportunity to object are required for fundamental fairness. *Pughsley v. 3750 Lake Shore Drive Cooperative Bldg.*, 463 F.2d 1055, 1056 (7th Cir. 1972); *Nationwide Amusements Inc. v. Natlin*, 452 F.2d 651, 652 (4th Cir. 1971).

IV

Yet while in the absence of a party-generated Rule 56 or Rule 12(b) motion the district court usually lacks power to enter a summary judgment, we must not cavalierly overlook the one specie of Rule 12 motion that can be made by the court on its own motion. Rule 12(h)(3) permits a court to dismiss an action *sua sponte* when the court determines it lacks subject matter jurisdiction. "[W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court [unless the federal claim is immaterial or wholly insubstantial] must entertain the suit." *Bell v. Hood*, 327 U.S. 678, 681-682. But the alleged First Amendment violations here "are not immaterial but form rather the sole basis of the relief sought." *Id.* at 683. Instead the district court might have proceeded under the assumption that Choudhry's First Amendment "cause of action is so patently without merit as to justify * * * the court's dismissal for want of jurisdiction." *Id.*[5] Indeed defendants agree with this view in their brief:

---

[5] The district court's language indicates that it implicitly viewed Choudhry's claim as "patently without merit" under *Bell*. Thus at the conclusion of the temporary restraining order hearing, the court noted:

> "I would say frankly I am going to find it difficult to grant this restraining order, but if I find so under the authorities that I have no alternative, I would do so." Tr. at 172.

Moreover, the court found the "allegations of the plaintiff to be wholly unsubstantial" (Mem. op. at 4). "Choudry cannot now rely upon the pro-

> "The opinion of the District Court does not explicitly state that Choudhry's case is frivolous, but it is submitted that the opinion is tantamount to such a finding and that such a finding would be appropriate." (Br. at 9 n.*.)

In order to be deemed "wholly insubstantial and frivolous" in the constitutional sense, a claim must be measured against a severe standard. 327 U.S. at 682-683. "[C]laims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial * * *." *Goosby v. Osser*, 409 U.S. 512, 518. One can conceive of situations where prison guards should be able to vent administrative incompetence to the public when prison security will not be unduly jeopardized thereby. Since the undisputed factual predicate here does not inexorably lead to the conclusion that Choudhry's statements were not constitutionally protected, we need not "decide nor intimate any view upon the [ultimate] merits," *id.* at 522, in order to conclude that the prior decisions cited to us by the defendants or those used by the district court leave " 'room for the inference that the question sought to be raised [by Choudhry] can be the subject of controversy.' " *Id.* at 519. As a result, a Rule 12(h)(3) dismissal cannot be sustained either.

V

Accordingly, the district court's order entering summary judgment for the defendants is reversed and the cause is remanded for further proceedings consistent herewith.

PELL, *Circuit Judge*, dissenting.

I am in general agreement with the majority that procedural due process, particularly as spelled out in the Federal Rules of Civil Procedure, would require something more than was here involved before summary judgment would be proper. This would seem to be particularly true where the claim for relief was based upon one of our most fundamental constitutionally guaranteed liberties, that of free-

tections of the first amendment to justify his reckless form of expression." *Id.* at 9.

dom of speech. Nevertheless, upon the record before us I think the district court properly entered summary judgment terminating litigation which I do not conceive could reach a different result no matter how much notice was given, no matter how much evidence was adduced, and no matter how much irrelevant and immaterial factual conflicts might be developed.

Here the material and dispositive facts existed not only without substantial controversy but, indeed, without any controversy. Those material facts as to which there was no genuine issue are stated in the majority opinion:

> On June 18, 1976, two months after being hired as a probationary correctional officer at the prison, Choudhry called the press to his home to express concern about security conditions at the prison. He also criticized the fact that he had received no formal training during his . . . employment. [Footnote omitted.]

Not surprisingly another fundamental First Amendment freedom, that of the press, was promptly exercised and under the headline, "Guard blows whistle on prison," the lead paragraph read as follows:

> A guard who mans one of the towers at the Indiana State Prison admits that he doesn't know how to fire a gun and a lot of the other prison guards don't either.

The next paragraph then quoted the plaintiff:

> Khalid Choudhry said that is just one indication of how lax and disorganized security is at the state prison in Michigan City.

In his brief in this court, the plaintiff refers to contested issues of fact such as the dispute as to whether he had received any on-the-job training with a gun, what information about specific procedures in the prison was classified, and whether some of the so-called confidential information was not in fact known to the inmates. The significant facts which are not disputed are that a novice guard called what amounted to a press conference and told reporters that he did not know how to use a gun and that security was lax

and disorganized. In his brief, furthermore, Choudhry contends that these are true. If the truth or falsity of some of these statements created genuine issues of material fact then, of course, summary judgment was improper. I cannot conceive, however, in the tinderbox context of any prison dependent upon security exceeding the purely minimal that the bare facts recited above, as to which there is no controversy, would not require the discharge of the employee irrespective of whether the reporters did or did not embellish some of the supporting specific factual details.

Even in the case of the public school teachers, while they may not be compelled to relinquish First Amendment rights, the "problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education of Township High School District 205, Will County,* 391 U.S. 563, 568 (1968).

In arriving at a balance between the right of a prison guard to speak freely about the prison at which he is employed and the efficiency of the public service, the purlieus would seem far removed from the public schools, as tempestuous as some of the occurrences may now be in the cloistered halls.

The prison scene is the appropriate context for the balancing here just as it was in the matter of prison correspondence:

> The case at hand arises in the context of prisons. One of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task. The identifiable governmental interests at stake in this task are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners. [Footnote omitted.]

Procunier, Corrections Director v. Martinez, 416 U.S. 396, 412 (1974).

The Supreme Court likewise differentiated the prison scene and disciplinary proceedings therein from the considerations applicable to parole revocation in *Wolff, Warden v. McDonnell,* 418 U.S. 539, 561-62 (1974):

> Prison disciplinary proceedings, on the other hand [as contrasted with parole revocation proceedings] take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. Although there are very many varieties of prisons with different degrees of security, we must realize that in many of them the inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner.

In the Court's words in *Wolff* it is against this background that we must make our constitutional judgments. In so balancing the respective interests of the individual to exercise his freedom of speech without regard to possible deleterious consequences to the governmental interests and still retain his employment, I think the public interest is entitled to very heavy weight in the measuring scales. While no doubt there has been considerable retreat from Judge (later Justice) Holmes' simplistic approach in *McAuliffe v. Mayor of City of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517 (1892) that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," *see Thompson v. Gallagher,* 489 F.2d 443, 446 (5th Cir. 1973), I do not conceive that the public weal is not entitled to a standard

which while according the public employee the right to speak as he wishes also requires him to be responsible for his statements. "When his speech is disruptive of the proper functioning of the public's business the privilege of governmental employment may be withdrawn without it being said that he was denied his freedom of speech." *Jenson v. Olson,* 353 F.2d 825, 828 (8th Cir. 1965).

These cases of necessity require case-by-case analysis. I do not suggest that in every case a prison guard should be precluded from commenting upon conditions in the prison; in considering the public interest we must be mindful that the public has an interest in knowing about the operation of its government. I am simply saying that this plaintiff with virtually no experience in the position showed such a blatant disregard for his responsibilities that the patent potentially incendiary nature of his remarks properly deprived him of the speech freedom mantle. That disastrous results did not follow the widespread dissemination of Choudhry's statements concerning prison security laxity, made deliberately for the purpose of that dissemination, is not attributable to any quality of restraint on the part of Choudhry but simply because of good fortune.

I also hold no brief for prison conditions as they exist generally throughout the country; but I would be ignoring reality if I did not also recognize that prison administrators are facing almost insuperable problems, which certainly were not bettered by the irresponsible mouthing of this plaintiff, not at a corner bar gabfest but at a press conference called by him. In sum, I would affirm the district court judgment as being one that should have been entered under the particular undisputed dispositive facts here involved.

I also add that it appears to me, in fairness to the district court judge, it should be observed that while he did comment during the course of the extended hearing on July 19, 1976, that what was before the court was the matter of the temporary restraining order, he also stated near the conclusion of the hearing that there were exhibits in evidence which he had not had an opportunity to read. He indicated also that he wanted to give "this a little more thought and a little reseach." It would seem that after doing so for a

reasonable length of time he concluded that the plaintiff's claim was meritless and with this I agree. I therefore respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Filed Aug. 2, 1976
at————————M
Francis T. Grandys, Clerk
U. S. District Court

KHALID CHOUDHRY,
Plaintiff,
v.
LEO D. JENKINS, et al.
Defendants.
} Civil No. S 76-117

ORDER

Plaintiff in the above-entitled action has filed a motion pursuant to Rule 65(b), F.R.C.P., seeking a temporary restraining order. After due consideration,

IT IS THE ORDER OF THIS COURT that plaintiff's motion be DENIED.

IT IS FURTHER ORDERED that, pursuant to Rule 56, F.R.C.P., summary judgment be entered in favor of defendants.

Robert A. Grant,
District Judge

ENTER: August 2, 1976

MEMORANDUM

On 12 April 1976, Plaintiff Choudhry began his employment as a correctional officer at the Indiana State Prison, Michigan City, Indiana. Shortly thereafter, Choudhry met with several newspaper reporters to express his dissatisfaction with the prison's security system and officer training program. As a result, two articles were published;[1] one

[1] See Appendix-A, *infra*.

entitled "Guard Blows Whistle on Prison", appeared in *The Gary Post-Tribune* on 19 June 1976, and the next day an article entitled "Prison Guard Who Speaks Out Loses Job", was carried in *The Hammond Times*.

When prison officials learned of plaintiff's actions, a Notice of Lock-Out was issued to all officers of the prison informing them that Choudhry had been suspended. On 22 June 1976, the Prison Personnel and Training Committee conducted a hearing to gather information to be presented to Warden Jenkins surrounding the validity of Choudhry's allegations.[2] Two days after receipt of this Committee's report, Jenkins decided to permanently dismiss plaintiff from his duties at the prison. Choudhry thereupon commenced this action pursuant to 42 U.S.C. § 1983 for declaratory, injunctive, and pecuniary relief, against officials of the Indiana State Prison and the Indiana Department of Corrections for alleged violations of first amendment rights.

On 6 June 1976, plaintiff filed a motion under Rule 65(b), F.R.C.P., seeking a temporary restraining order requiring the defendants to reinstate Choudhry to his former position and to prohibit defendants from retaliating against him. On 19 July 1976, this Court entertained oral arguments concerning plaintiff's motion, and received several exhibits from both parties. Given the length of those exhibits and the gravity of the issue involved, the matter was taken under advisement. It is this motion the Court shall now consider.

It is generally recognized that in order to succeed on a motion for a temporary restraining order, the movant must show:

> "(1) the significance of the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the state of balance between this harm and the injury that granting the injunction would inflict on defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest." 11 Wright & Miller, *Federal Practice & Procedure: Civil*, § 2948, pp. 430-431 (1973).

[2] Choudhry was present at this meeting and represented by Lieutenant Mel Hood, a union representative for the institution. Also present were Ira Parkman, Administrative Assistant; Steve Lasky, Administrative Assistant to the Executive Director; W. Kaufman, Investigations Officer; F. Rentschler, Business Administrator; and Jack Duckworth, Assistant Warden. The entire panel concurred in the decision that some form of disciplinary action should be taken against Choudhry for his statements to the press.

Thus, the initial and foremost hurdle facing the plaintiff is to show irreparable harm. During the course of the July 19th hearing, Choudhry attempted to show that defendants dismissed him for his public criticism of the prison. He maintains that such retaliation constitutes an infringement of free expression as ensured by the first amendment.[3]

There can be no doubt that the first amendment's guarantee of free speech is one of our most cherished constitutional doctrines. The protection it affords is substantially unaffected by the fact that a citizen is employed by an instrumentality of the state. *Hanneman v. Breier*, 528 F.2d 750, 752 (7th Cir. 1976); *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 572 (7th Cir. 1972). And it applies regardless of the employee's status or contractual relationship with his public employer. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Illinois State Employees Union v. Lewis, supra.*

However, the freedom to express one's views on matters of public concern is not an absolute right; rather, it is a privilege which must be judicially weighed against competing governmental interests. *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *United States v. Dennis*, 341 U.S. 494 (1951); *United States v. Woodward*, 376 F.2d 136 (7th Cir. 1967); *Commonwealth of Pa. v. Philadelphia Psych. Ctr.*, 356 F.Supp. 500, 507 (E.D.Pa. 1973). As cogently stated by the Supreme Court in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968):

> "The problem in any case is to arrive at a balance between the interest of the [public employee], as a

[3] Deprivations of first amendment guarantees constitute irreparable injury for purposes of a temporary restraining order. *See, e.g., A Quaker Action Group v. Hickel*, 421 F.2d 1111 (D.C. 1969); *Keefe v. Geanahos*, 418 F.2d 359 (1st Cir. 1969); *Henry v. Greenville Airport Comm'n*, 284 F.2d 631 (4th Cir. 1960).

> citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services its performs through its employees." *Id.* at 568.

Certainly the conditions existing within a state penal institution are matters of considerable public concern. But it is equally true that the preservation of order and discipline within that institution are important interests of the state:

> "One of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task. The identifiable governmental interests at stake in this task are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners." 416 U.S. at 412.

These are the conflicting interests the Court must conciliate in the instant case.

Since defendants concede that Choudhry's dismissal was prompted by his public statements, they must sustain the heavy burden of justifying their actions. *Illinois State Employees Union v. Lewis, supra,* at 574. The state officials maintain that Choudhry's allegations as reported by the press are false and pose a continuing threat to prison security. Furthermore, they argue that the former correctional officer has released certain confidential information which may also have deleterious effects upon the proper administration of the institution.

In the landmark decision of *Pickering v. Board of Educ., supra,* the Supreme Court recognized that open comment by a public employee which is false, and made either with the knowledge of its falsity or with reckless disregard of the truth, constitutes an impermissible form of expression. *See, New York Times Co. v. Sullivan,* 376 U.S. 254, 280 (1964). *Pickering* further noted that certain statements, although true, may fall outside the ambit of first amendment protection if the need for confidentiality is so great

as to justify a dismissal of the employee. *See e.g., Hanneman v. Breier, supra.*

Thus, the first task of this Court is to ascertain the accuracy of Choudhry's statements based upon the evidence which has been introduced. Having examined the briefs, exhibits, and testimony of several witnesses, the Court finds the following allegations of the plaintiff to be wholly unsubstantial: that the overall security of the prison is "lax", "disorganized", and "near collapse"; "that knives are made openly in prison workshops where there is little supervision"; that "officials . . . won't order shakedowns of cell to confiscate . . . weapons"; that inmates and guards are in "constant fear of death"; that many of the correctional officers are unable to shoot a rifle; that "inmates flaunt rules regulating their conduct with tacit approval of prison authorities"; and that "the situation is so bad . . . inmates will challenge guards who try to enforce . . . rules". Furthermore, Choudhry has greatly exaggerated the frequency and gravity of incidents which have occurred within the prison.

The Court also finds that these false utterances which appear in the newspaper articles have been made with reckless disregard as to their truth or falsity. Working as a correctional officer, plaintiff was in a position to determine with a minimum degree of effort the true picture of the matters discussed in the articles. Rather than explore matters for himself, or to discuss with his superiors any problems or difficulties he may have had, Choudhry chose to publicly levy serious allegations against the prison based solely upon hearsay and conjecture.

The following colloquy between Assistant Warden Duckworth[4] and defendants' counsel reveals the impact these misleading statements may have on members of the prison community:

Mr. Diamond: "What effect could reasonably by an-

---

[4] The witness holds a Master of Arts Degree in Conuseling and Guidance from Indiana University and is currently a doctoral candidate at the same institution. He has been employed by penal institutions in his professional capacity for 5½ years, and has served as Acting Warden of the Indiana State Prison at Michigan City for a period of six months.

ticipated upon the institution from those newspaper articles?"

Mr. Duckworth: "The effects would be anything from just casual curiosity to the inquiry that inmates are known to make into any hopeful avenue of escape, assault, or violence of any form."

Mr. Diamond: "Would a part of that tension be fear on the part of some inmates?"

Mr. Duckworth: "Oh, yes."

Mr. Diamond: "What would be the nature and basis of that fear?"

Mr. Duckworth: "Fear of the danger that they may encounter from other inmates from carrying out any scheme that they try to devise in anyone that they felt they had hope in attaining."

Mr. Diamond: "Would the level of that fear and resulting tension affect the likelihood of any incident of violence or violations of the orders within the institution?"

Mr. Duckworth: "Yes."

Mr. Diamond: "What effect would the information included in those newspaper reports have upon that fear and tension?"

Mr. Duckworth: "I feel that the contents of the newspapers as read by inmates, would give them another source of information to make more complete a picture of that they have in their own minds and this, of course, can be borne out by discussion with inmates. If they feel they can put together one more part of the picture of materializing an escape or assault or a general disruption, then they have succeeded in one of their goals."

The Court does not agree with plaintiff that these feared results are merely conclusory or baseless allegations. *Compare, Commonwealth of Pa. v. Philadelphia Psych. Ctr., supra.* Duckworth has stated with sufficient particularity the impressions such an erroneous picture may have upon the mind of a prison inmate and the steps he may take as a result thereof. While it is true Duckworth is unable to identify any particular assault, escape, or other act of violence stemming from the news reports, it is clear the burden is not that great. The Supreme Court has remarked that prison officials must be allowed "some latitude in anticipating the probable consequences of allowing certain speech in the prison environment." 416 U.S. at 414. Such leeway is essential to an administrator's duty to preserve internal order and discipline, to prevent unauthorized access or escape, and to rehabilitate inmates placed in their custody. *See also, United States v. Dennis, supra,* at 511. By necessity, a court must deal with probabilities based upon credible evidence. *Commonwealth of Pa. v. Philadelphia Psych. Ctr., supra,* at 508.

This Court has no reason to question the credibility of Duckworth. Although a defendant to this action, his expert testimony has gone unchallenged.[5] Moreover, the Court does not possess the skill or expertise needed to challenge the efficacy of the conclusions drawn by defendants.

> "Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of

[5] Duckworth's testimony is supported by statements of Warden Jenkins which appeared in *The Hammond Times* on 23 June 1976. The article, introduced into evidence by plaintiff, reads in part:

> "However, [Jenkins] insisted that the overall security of the prison has not been endangered because there is no one issue for the inmates to rally around. That kind of large-scale discontent is what causes prison riots . . . ."

> realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." 416 U.S. at 404-405.

The defendants' professional opinions have a basis in reason; it is not the proper function of a court to venture beyond this point.

Experience has shown too often that disturbances within a penal institution endangers not only property interests of the state, but also the personal safety and well-being of inmates, prison employees, and members of the community at large. Although the principles of the Constitution are great, it is this real and serious threat to societal order which tips the balance in favor of defendants. This potential for disruption in a prison context is the factor which effectively distinguishes plaintiff's authority. Choudhry relies heavily upon *Commonwealth of Pa. v. Philadelphia Psych. Ctr., supra,* wherein a nurse was dismissed from her employment duties for publicly criticizing a state mental hospital's care and treatment of patients. The hospital's defense of "staff anxiety" was held to be an insufficient reason to override the employee's personal freedom of expression In the case at bar, however, defendants do not argue that the attitude or morale of the other prison guards has, or will be, adversely affected. Their sole interest is to preserve existing harmony among the prison inmates in an extremely volatile environment. *Compare also, Ring v. Schlesinger, supra,* (teacher's criticism of school principal: protected); *Donahoue v. Staunton,* 471 F.2d 475 (7th Cir. 1972) (chaplain's criticism of conditions in mental hospital: protected); *Kiiskila v. Nickols,* 433 F.2d 745 (7th Cir. 1970) (distribution of anti-war literature to naval officers: protected). In none of the abovementioned cases was the criticism false, or a threat to the personal safety of any individual.

For the aforesaid reasons, the Court concludes that Choudhry's false and reckless form of expression justifies the termination of his employment at the prison. Just as "the first amendment would not protect a man in falsely shouting fire in a theatre", *Schenck v. United States,* 249 U.S. 47, 52 (1919), it cannot protect him in creating disturbances within a prison via the news media.

Furthermore, the Court finds that the following two statements appearing in the news articles, albeit true, also justify the firing of Choudhry:

> "[Choudhry] said his job for the past several weeks has been to man one of the ten guard towers which surround the prison and that he does not know how to use a .12 gauge shotgun and high powered rifle he is issued." *The Hammond Times,* Appendix-A.
>
> "The guard [Choudhry] said in case of an escape attempt or disturbance in which he has to open fire his orders are to shoot to wound the perpetrators." *The Gary Post-Times,* Appendix-A.

Defendants contend that the number and types of weapons in the guard towers, and the procedures to be followed in the event of an escape or disruption, are facts best kept from prisoners. According to expert testimony, public dissemination of such information may provide an inmate with the incentive needed to create a disturbance or to escape custody. Moreover, an inmate possessing knowledge of this facet of the prison's overall defense system will be at a distinct advantage should be decide to take such action.

Again, the Court is not in a position to refute the soundness of these conclusions. Further, while the dissemination of the truth should rarely be prohibited, this Court finds that the potential adverse consequences flowing from the disclosure of the prison's weaponry and defense tactics clearly outweigh Choudhry's interest in speaking on matters of public concern. Criticism of the officer training program could have been accomplished without having to resort to the release of such sensitive material.[6] It is no excuse that no one told Choudhry that these matters are

[6] Choudhry's statement that he and many other guards at the prison have not received training at the police training school in Indianapolis is also a correct portrayal of the situation as it exists at the prison. Had Choudhry limited his statements to the officer training programs, this may have been a different case. However, the Court need not consider that question in light of the foregoing discussion.

confidential; throughout his training, an officer is told to ask questions of his superiors whenever in doubt. A moment's reflection upon the possible impact the release of such information may have had on the administration of the prison should have raised some doubt or question in the mind of the correctional officer. Choudhry cannot now rely upon the protections of the first amendment to justify his reckless form of expression. *See, Pickering v. Board of Educ., supra; Hanneman v. Breier, supra.*

Plaintiff also contends that the loss of employment and the resulting harm to his good name and reputation constitute irreparable injury. However, in light of the Court's finding that Choudhry's first amendment rights have not been violated, plaintiff's contention is rendered moot. Moreover, since Choudhry has based his entire cause of action upon an unmeritorious constitutional claim, the defendants are entitled to an award of summary judgment. Accordingly, the Court, on its own motion, will grant summary judgment in favor of the defendants since there exists no genuine issue of fact which may alter the findings or conclusions of this Court.

For the foregoing reasons, plaintiff's motion for a temporary restraining order is DENIED, and summary judgment in defendants' favor will be ENTERED.

APPENDIX C

GARY POST-TRIBUNE
SATURDAY, JUNE 19, 1976

Guard blows whistle on prison

By TOM KNIGHTLY
Post-Tribune Staff Reporter

HAMMOND—A guard who mans one of the towers at the Indiana State Prison admits that he doesn't know how to fire a gun and a lot of the other prison guards don't either.

Khalid Choudhry said that is just one indication of how lax and disorganized security is at the state prison in Michigan City.

Even the prisoners are critical of the inadequate security and feel as a result their lives are in constant jeopardy, says Choudhry, 21, a native of Pakistan who has been in this country four years.

Choudhry, who has been employed as a guard at the prison about three months while also attending Calumet College in Hammond, said he wanted to expose conditions inside the prison to see if something can be done to clean up the institution.

"I want the public to know and at the same time bring the situation to the attention of the public officials who are in position to take corrective steps," said Choudhry.

He gave the following as examples of how bad conditions are in the prison:

√ Guards are hired off the street and given little or no training.

√ In less than three months, there have been eight stabbings, one of them fatal.

√ Even though everyone knows that knives are in abundant supply as contraband, prison officials still won't order shakedowns of cells to confiscate the weapons.

√ Inmates flaunt rules regulating their movements with tacit approval of the prison authorities.

Because many of the rules and regulations are not enforced or followed by the prison authorities, there is a near-breakdown of security, Choudhry charged.

He said the situation is so bad that inmates will challenge guards who try to enforce some rules. One rule he said is ignored requires prisoners to have passes to go from one cellhouse to another.

Choudhry said many of the prisoners are concerned over the prevalence of so many knives and are requesting more shakedowns.

The last prinsonwide search was three weeks ago, but it was called off after only half the cells were covered, despite the fact that numerous knives were impounded, Choudhry said.

In the knifing incidents over the past three months, one inmate was killed and four wounded, according to the guard. He reported that three civilian foremen were knifed in the license plate shop Wednesday and one of the men is in serious condition.

He said the weapons are made clandestantly by inmates in the prison workshops, where supervision is inadequate.

Choudhry said it is clear from the latest incident that a shakedown is needed, but as of Friday no search had been initiated.

Choudhry noted that guns were smuggled into the prison on at least two occasions recently. One of the guns even found its way into the maximum security cells where it was used by two prisoners to hold guards hostage. The guards were released after authorities met the inmates demands to arrange a press interview about conditions inside the prison.

Choudhry told newsmen during an interview Friday in his home in Hammond that he and many of the other guards did not receive much, if any, training.

Although he mans a tower armed with shotgun and a rifle, Choudhry said he doesn't know how to fire a gun.

He said the assistant warden knows it because he told him so several weeks ago.

"I don't know how to shoot a gun, and many of the other officers don't either," the guard said.

He said the required training course for prison guards at Michigan City includes one week instruction at the prison and three at the police training school in Indianapolis.

"A lot of us haven't received any of this training," he said.

A guard mans each of the 10 towers in operation at the state prison, commanding views both inside and outside the walls. The guard said in case of an escape attempt or disturbance in which he has to open fire, his orders are to shoot to wound the perpetrators.

Choudhry, who says he has worked previously for a time as a store detective, claims he was hired as a prison guard through the Indiana Employment Security office in Hammond.

He says he took the job partly for the experience he thought would be useful insofar as he is majoring in law enforcement in college. He said he wants some day to obtain a law degree.

THE HAMMOND TIMES
SUNDAY, JUNE 20, 1976

Prison Guard Who Speaks Out Loses Job

By ROBERT O'HEARN
Times Staff Writer

HAMMOND—An Indiana State Prison guard who described to newsmen Friday the lax and disorganized security at the Michigan City prison was ordered suspended Saturday by Warden Leo D. Jenkins because of the disclosures.

Prison business administrator Fred Rentschler told The Times Saturday that Jenkins ordered the suspension for Khalid Choudhry, 21, of Hammond, because he "made some inaccurate disclosures that should have been aired to the warden before they were made to the press."

Rentschler said Jenkins will hold a hearing at the prison Tuesday "which may or may not be open to newsmen" to

determine if any action will be taken against Choudhry, a native of Pakistan who has been in this country for four years.

On Friday, Choudhry met with reporters in his home and told of the near collapse of security in the prison, including its maximum security section where recently two prisoners used knives that were smuggled in to hold several guards hostage.

Choudhry, who has been working as a correctional officer at the prison for about three months, said "things are happening inside the institution so continuously that serious action should be taken immediately by the Department of Corrections."

He noted that last Wednesday three civilian foremen in the prison license plate shop were knifed by inmates and that one is in serious condition. He described other knifing incidents in the last three months in which five prisoners were stabbed and one was killed.

He said weapons, mostly knives are made openly prison workshops where there is little supervision.

Choudhry told of a recent prisonwide shakedown which covered only half of the institution and was called off despite the fact that a large number of knives were found.

He said his job for the past several weeks has been to man one of the 10 guard towers which surround the prison and that he does not know how to use the .12 gauge shotgun and high powered rifle he is issued.

"I don't know how to shoot any gun," Choudhry said, "and they (prison officials) never asked me if I did."

He said he has had no previous law enforcement experience other than working as a store security guard.

Choudhry said he is attending Calumet College where is is majoring in law enforcement and he said he hopes to attend law school and become an attorney.

Choudhry said his only motive for exposing the conditions at the prison "is for the public to know what is going on there and maybe they can pressure the public officials to take the proper steps to correct the situation."

He said he bares no ill feelings toward Jenkins or any other officials in the corrections department, but he said the disclosures must be made "because I feel it is best for the institution."

Choudhry said that some of the inmates and guards have expressed fears that they are in "constant danger of being killed" because of the security problems.

The only major charge made by Choudhry which was refuted by prison officials is that inmates consistently violate prison rules governing their movements within the institution.

Choudhry maintains that prison officials ignore a rule which requires inmates to have passes to go from one cell house to another or to any other section of the prison.

Rentschler told The Times that prisoners must have passes and if they don't they are disciplined.

A Times reporter who recently visited the prison, however, personally saw inmates walking free inside the maximum security sections and overheard them admitting to guards that they had no passes.

A Times investigation into prison security in October, 1974 revealed that security is so lax in some sections of the prison and on the honor farms that convicted murderers can walk away virtually undetected.

At the time of The Times investigation, acting Warden Jack Duckworth blamed "understaffing" for the situation.

Rentschler admitted that security is a "problem" and he said some of things Choudhry disclosed were true.

Like Duckworth, Rentschler blamed understaffing and problems in obtaining correctional officers for the security problems.

"A prison is not the most attractive place to work in to begin with," Rentschler said. He said "we have some people who come to work here and stay 2 or 3 days and quit because they can't take it."

Rentschler also admitted to Choudhry's charges that guards are simply hired off the street and not given adequate training. He blamed that on understaffing, saying prison officials could not afford the time to send the guards to be trained.

Supreme Court, U. S.
FILED
NOV 18 1977
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-585

STATE OF INDIANA, et al.,

Petitioners,

VS.

KHALID CHOUDHRY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinion Below	1
Jurisdiction of this Court	1
Questions Presented for Review . .	1
Statement of the Case	1
Argument	3
No Unsettled or Important Federal Question has been Presented for Review	4
Summary Judgment was Based Upon the District Court's Improperly Making Findings of Fact	7
Conclusion	8

TABLE OF AUTHORITIES

Cases	Pages
Supreme Court Decisions:	
Fountain v. Filson, 336 U.S. 681 (1949)	7
Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464 (1962)	7
Simmler v. Conner, 372 U.S. 221 (1963)	7
Surowitz v. Holton Hotels Corp., 383 U.S. 363 (1966)	5
United States v. Diebold, Inc., 369 U.S. 654 (1962)	7
Circuit Court Decisions:	
Brown v. Strickler, 422 F.2d 1000 (6th Cir. 1970)	5
Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971)	4
Dry Creek Lodge, Inc. v. U.S., 515 F.2d 926 (10th Cir. 1975)	4
Georgia So. & Fla. Ry. v. Atlantic Coast Line R.R., 373 F.2d 493 (5th Cir. 1967)	4
Johnson v. Rac Corp., 491 F.2d 510 (4th Cir. 1974)	4
Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976)	6
Macklin v. Butler, 553 F.2d 525 (7th Cir. 1977)	4
Nationwide Amusements, Inc. v. Nattin, 452 F.2d 651 (4th Cir. 1974)	4

	Pages
District Court Decisions:	
Erie Technological Products, Inc. v. Centre Engineering, Inc. 52 F.R.D. 524 (M.D. Pa. 1971)	4
Penn Galvanizing Co. v. Lukens Steel Co., 59 F.R.D. 74 (E.D.Pa. 1973)	4
Constitution and Statutory Provisions	
First Amendment to the Constitution of the United States	6
42 U.S.C. § 1983	5,6
Other Authority	
Rule 56 of the Federal Rules of Civil Procedure	2,5,6,8

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.

STATE OF INDIANA, et al.,

Petitioners,

VS.

KHALID CHOUDHRY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent prays that the Petition for Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings on the 22nd day of July, 1977, be denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has been reported at 559 F.2d 1085 (7th Cir. 1977).

JURISDICTION OF THIS COURT

See petition.

QUESTIONS PRESENTED FOR REVIEW

See petition.

STATEMENT OF THE CASE

Respondent Choudhry began his employment as a correctional officer at the Indiana State Prison on April 12, 1976. During his term of employment, he became concerned over what he felt were deficiencies in his training and in security conditions at the prison. When his attempts to correct these problems by contacting his superiors did not produce the results he sought, he felt compelled to inform the general public of his concerns. This was accomplished by subsequent contacts with members of the press on June 18, 1976.

Articles informing the public as to the nature of Choudhry's statements appeared in area newspapers the following day. When made aware of these articles, defendant Warden Jenkins issued an order suspending Choudhry from employment. After receiving a report from the hearing panel which questioned Choudhry on the matter, Jenkins ultimately decided that his employment with the Department of Corrections should be terminated. The asserted reasons for the termination were Choudhry's release of confidential information to non-corrections personnel and his failure to observe the chain of command in holding a press interview.

Choudhry initiated litigation and on July 19, 1976, a hearing was held on his motion for a temporary restraining order. At the hearing, the defendants conceded that his dismissal was prompted by his public statements. Choudhry's motion was denied, and the judge, on his own motion and without any previous notice as to his intentions, granted summary judgment for the defendants.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed the judgment of the District Court and remanded the case for further proceedings, stating

> "Rule 56 plainly does not authorize a court to enter an arbitrary summary judgment sua sponte against a party; indeed the express language of paragraphs (a) and (b) of the

> Rule discloses that a motion for summary judgment is to be made by a party."

The Seventh Circuit stated, in addition, that

> . . . to the extent the district court's decision here is based on a rejection of plaintiff's version of the operative material facts, it could not stand wholly apart from notice defects.

ARGUMENT

Respondent's argument for the denial of certiorari focuses in two major areas: First, there is no disagreement among the circuits over the issue presented and consequently no important federal question has been raised; therefore, it would be inappropriate for this Court to grant certiorari in this case. Second, even if there is a substantial federal question raised, the specific circumstances of this case show that summary judgment was based upon the district court's improperly making findings of fact. This provides the second reason why the petition for writ of certiorari should be denied.

I

NO UNSETTLED OR IMPORTANT FEDERAL QUESTION HAS BEEN PRESENTED FOR REVIEW

Respondent has examined the various circuits which have passed upon the question of whether summary judgment should be granted in the absence of notice to the affected party and without a reasonable opportunity to gather sufficient evidence to contest the judgment. All circuits that have been presented with the question have uniformly held that this cannot be tolerated. Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971); Nationwide Amusements, Inc. v. Nattin, 452 F.2d 651 (4th Cir. 1974); Johnson v. Rac Corp., 491 F.2d 510 (4th Cir. 1974); Georgia So. & Fla. Ry. v. Atlantic Coast Line R.R., 373 F.2d 493 (5th Cir. 1967); Macklin v. Butler, 553 F.2d 525 (7th Cir. 1977); Dry Creek Lodge, Inc. v. U.S., 515 F.2d 926 (10th Cir. 1975). In the Third Circuit, two district court decisions have stressed with importance that an opportunity for discovery must be provided prior to any granting of summary judgment. Erie Technological Products, Inc. v. Centre Engineering, Inc., 52 F.R.D. 524 (M.D. Pa. 1971); Penn Galvanizing Co. v. Lukens Steel Co., 59 I.R.D. 74 (F.D. Pa. 1973). In the present case, discovery had not yet been initiated, and respondent had prepared only for a hearing on a temporary restraining order. The Seventh Circuit Court of Appeals recognized this fact in its decision: "The district court's award of summary judgment came with no warning, taking

plaintiff completely by surprise." (559 F.2d at 1088.) The action of the lower court was even more surprising because the judge had gone on record to the effect that he was limiting his attention to the restraining order. (559 F.2d at 1088.)

The circuit court further recognized that the district court's decision directly contradicted the express wording of Rule 56, noting that the Rule "contemplates" both notice and an opportunity to respond prior to the granting of summary judgment. (559 F.2d at 1088-89.)

Finally, this Court has itself recognized a distrust of summary dispositions.

> "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. . . If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits."

Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966). The lower federal courts have similarly stressed this policy, particularly in regard to constitutional issues raised under 42 U.S.C. § 1983. As explained in Brown v. Strickler, 422 F. 2d 1000 (6th Cir. 1970), Congress in

enacting § 1983 created a specific legal remedy to redress state infringement of constitutionally guaranteed rights; frequent issuance of summary judgment against § 1983 litigants would therefore tend to abrogate the specific Congressional policy of protecting such rights. This would especially hold true when the case involved the preferred rights secured under the first amendment. Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976).

The above-enunciated interpretation of policy further supports the limitations of Rule 56 to its specific provisions and the necessity that district courts comply with the notice requirement of Rule 56(c).

In summary, the circuit court's decision in this case not only follows the express provisions of Rule 56, but it is also in compliance with the policies of this Court. Respondent has further shown that all circuits which have confronted the same or similar issues have decided uniformly in accordance with the Seventh Circuit's holding. Therefore, no federal question of substance has been raised and it is not appropriate for this Court to issue a writ of certiorari to review the appellate court's decision.

II

SUMMARY JUDGMENT WAS BASED UPON THE DISTRICT COURT'S IMPROPERLY MAKING FINDINGS OF FACT

Even if the legal issue presented by the State of Indiana amounts to a substantial federal question, the district court's grant of summary judgment was erroneous due to the presence of contested issues of material fact at that time.

Federal courts have long recognized that summary judgment is not proper when there is a dispute as to any material fact. Simler v. Conner, 372 U.S. 221 (1963); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962); Fountain v. Filson, 336 U.S. 681 (1949). In ruling on a motion for summary judgment the trial court is merely to determine whether a genuine issue remains and is not to resolve any existing factual issues. United States v. Diebold, Inc., 369 U.S. 654 (1962).

Upon examination of the record, the circuit court found numerous unresolved material factual issues and pointed to those issues with specificity. (559 F.2d at 1089-90). It is thus clear that in arriving at its grant of summary judgment, the trial court rebuked its obligation to determine only if there were no contested factual issues of materiality. Rather, it acted in excess of its authority and made determinations of fact, resolving them against the plaintiff in

the face of evidence to the contrary, as pointed out by the court of appeals. The factual situation in this case was wholly inappropriate for summary judgment, and for that reason, this court should refuse to order a writ of certiorari.

CONCLUSION

This brief has detailed the reasons why this Court should not entertain certiorari in this matter. First, due to the uniformity of this circuits on this rule of law, the express wording of Rule 56, and policies adopted by the United States Supreme Court, there is no substantial question in need of resolution by this Court. Second, the fact that the District Court improperly granted summary judgment when there were existing questions of material fact clearly sustains the circuit court's reversal of the district court's decision. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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